POWER IS ATTACHED, OR IF WRITTEN AFTER THE EXPIRATION DATE SPECIFIED ON THE ATTACHED POWER OF ATTORNEY"

The power of attorney attached to each bond also contained the following language:

"'NOTICE'
STACKING OF
POWER IS STRICTLY
PROHIBITED!
No more than one power from this Surety may be used to execute any one bond."

These two restrictions were prominently displayed on each of the bonds and alerted the jailor and the clerk of the court to the prohibition against "stacking". Nevertheless, the bonds were accepted as bail for the one defendant in a single case, in violation of its express terms.

Moreover, the powers of attorney attached to each bond were blank, and did not name any person as appointed attorney-in-fact. Despite the missing name for the attorney-in-fact, the bonds and powers of attorney were accepted by the jailor and clerk without question.

On December 11, 2002, Hernandez failed to appear for a sentencing hearing. The court declared the bail forfeited under California Penal Code §1305, and mailed notice of forfeiture on December 12, 2002.

Petitioner filed a motion with the court, also pursuant to §1305, to vacate the forfeiture and exonerate the bond. The motion was made on the grounds that the bonds were void because no attorney-in-fact had been designated,

and because of the bonds' express provisions against "stacking" and use of multiple powers of attorney.

The motion was supported by the declaration of Darleen Fritz, president of Aegis Security Insurance Company. The declaration contained the following pertinent, undisputed facts:

— Aegis' contract with its agent required that issuance of any bond in excess of $1,000,000 receive her personal approval;

– She did not authorize the issuance of bonds totaling $1,560,000 for this single defendant;

– The powers of attorney were "stacked" in violation of the express restrictions printed on the bonds and on the powers of attorney;

– She did not communicate with any official of the State or County of Los Angeles that Aegis' agent was authorized to post bail in excess of $1 million.

On July 24, 2003, the Los Angeles County Superior Court denied Aegis' motion. Petitioner promptly appealed to the Second District Court of Appeals. On December 8, 2004, the Second District issued an opinion affirming the trial court opinion.

The Court reached this conclusion based on reasoning which violates the express term of the bonds. The Court excused the lack of a designated attorney-in-fact, holding that the powers were not misleading because they were "clearly executed" by the agent (an agent who was not identified in the power of attorney).

Second, the court rationalized away the prohibition against "stacking". By construing the transaction as two separate bonds, the court held that there was no "stacking", even though the limiting language of the powers of attorney

and the bonds themselves precluded such a construction, and limited the authority to issue bonds to a single bond for a single defendant and case, with a dollar limit of $1,000,000 or less.

Petitioner sought review of this erroneous ruling from the California Supreme Court. Review was denied on March 16, 2005. This timely Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Review to Find that the Constitutional Protections Against Impairment of Contracts Applies to the Lawmaking Actions of State Courts

By declaring the forfeiture of a bond in direct violation the express terms of the bonds, and by disregarding the limiting language of the bonds and powers of attorney, the Los Angeles County Superior Court significantly impaired Petitioner's contractual rights arising from those documents. The manner in which these rights were impaired violates the express terms of the Constitution's Impairment Clause, Article I, Sec. 10, which precludes states from enacting laws which impair the obligation of contracts.

Applying a highly literal interpretation of this clause, this Court in the past has refused to apply the clause's protection to judicial decisions. The Court should revisit that interpretation in this case because the Los Angeles Superior Court has done something which courts are increasingly wont to do – to interpret statutes like Penal Code §1305 in a manner so deviant from the express will of the Legislature that it amounts to lawmaking. By disregarding the express terms of the contract and refusing to vacate the forfeiture

mandated by the Penal Code section, the Superior Court has engaged in a lawmaking function against which this Court has repeatedly warned. Since judges are more and more undertaking a legislative function, the Court should revisit its prior Impairment Clause decisions and impose on judge-made law the same obligation against impairment of contracts that it imposes on legislatively-enacted law.

This Court has in the past held that the Impairment Clause only applies to acts passed by a legislature, not to judicial acts or decisions. *Kryger v. Wilson* (1916) 242 U.S. 171, 177, 37 S.Ct.34, 36. The Courts have based this rule upon a literal interpretation of the Impairment Clause ("No state shall...pass any...Law impairing the Obligation of Contracts..."), reasoning that "pass any...Law" can only refer to the legislative act of enacting a statute. *See Rooker v. Fidelity Trust Co.* (1923) 261 U.S. 114, 118, 43 S.Ct. 288, 289 ("The contract clause of the Constitution, as its words show, is directed against impairment by legislative action, not against a change in judicial decision.")

This literal interpretation, however, fails to recognize a basic truth – that courts, as much as legislatures, engage in lawmaking. This Court modernly has repeatedly spoken with disfavor concerning state and federal courts usurping state legislative functions. "[T]here must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Colorado General Assembly v. Salazar* (2004) 541 U.S. 1093, 124 S.Ct. 2228, 2230 (*Rehnquist*, dissenting from denial of certiorari); *Sosa v. Alvarez-Machain* (2004) __ U.S. ___, 124 S.Ct. 2739 (cautioning against judicial recognition of new causes of action absent legislative action); *see also Household Credit Services v. Pfennig* (2004) 541 U.S. 232, 244, 124 S.Ct.1741, 1749.

At the same time, this Court recognizes that courts in a common-law system like ours frequently engage in legitimate lawmaking. *See Rogers v. Tennessee* (2001) 532 U.S. 451, 462, 121 S.Ct. 1693, 1700 (judicial abolition of common-law "year-and-a-day" rule in homicide cases did not violate due process); *see also U.S. v. Wells* (1997) 519 U.S. 482, 509, 117 S.Ct. 921, 936, *Stevens*, dissenting ("...Congress looked to the courts to play an important role in the lawmaking process by relying on common-law tradition and common sense to fill in the gaps – even to imply causes of action and remedies that were not set forth in the statutory text."). Often, there can be a fine line between interpreting the law and making law, and courts can and do cross that line on a regular basis. *See Ford Motor Credit Co. v. Milhollin* (1980) 444 U.S. 555, 568, 100 S.Ct. 790, 798 ("Thus, while not abdicating their ultimate judicial responsibility to determine the law, judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational." [Citation omitted])

Thus, while this Court has announced its disfavor of judicial lawmaking, it has dealt with repeated examples in which courts have engaged in that very function. To say that courts do not engage in lawmaking denies the reality of how courts have acted both under the common law and modernly.

It can well be said that in enacting the Impairment Clause, the Founders could not have envisioned a system in which courts have engaged in lawmaking, both legitimate and illegitimate, to the extent they have. Under the literal interpretation followed by this Court to date, this lawmaking function receives a special protection from the Impairment Clause analysis that legislative enactments do not, a conclusion which could not have been intended by the Founders. In many other instances courts have warned

against a literal interpretation of a writing which gives rise to anomalous results. *Carchman v. Nash* (1985) 473 U.S. 716, 743, 105 S.Ct. 3401, 3415, fn. 11 ("The literal interpretation of the words of an act should not prevail if it creates a result contrary to the intention of the legislature."); *see also U.S. v. Southern Ute Tribe or Band of Indians* (1971) 402 U.S. 159, 177, 91 S.Ct. 1336, 1345, fn. 2.

The state court's action in this case severely impaired the Petitioner's contract rights. In California, a bail bond is a contract between a surety and the State. *People v. Seneca Ins. Co.* (2003) 29 Cal.4th 954, 963-964; *County of Orange v. Classified Ins. Corp.* (1990) 218 Cal.App.3d 553, 556; *People v. King Bail Bonds* (1990) 224 Cal.App.3d 1120, 1124. It has long been the recognition of this Court that the surety's liability is limited by contract. *Martin v. Thomas* (1860) 65 U.S. 315, 317 ("[T]he liability of a surety is not to be extended, by implication, beyond the terms of his contract...He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.")

Since the bonds at issue are contracts under California law, they are protected against impairment by any law of the State of California. A state is no more entitled to impair its own contracts than it may impair contracts between private parties. *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 17, 97 S.Ct.1505, 1515 ("It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties.") Thus, California cannot, by unilateral action, impair the obligations incurred or protection's afforded by the Petitioners' contracts.

An impairment occurs when a state law alters an obligation under a contract or precludes its enforcement or

protections. *See In re State Tax on Foreign-Held Bonds* (1872) 82 U.S. 300, 320. ("A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement"). While courts have held that the impairment must be substantial to violate the Constitution, a substantial violation occurs when an action abridges a right which fundamentally induced the parties to contract initially or when it abridges legitimate expectations which the parties reasonably and heavily relied upon in contracting. *Bricklayers Union Local 21 v. Edgar*, 922 F.Supp. 100, 106-107 (N.D.Ill.,1996)

In this case, the Los Angeles County Superior Court unilaterally impaired the Petitioner's contractual obligation when it accepted and then declared the bonds forfeited in express violation of the limiting language found in the bonds and powers of attorney. By completely disregarding such limiting language, the court did what it could not do – it denied Petitioner the basic protections of the contracts' limiting language. Since the court's action created a liability on the part of the Petitioners that did not exist under the contracts, it is very clear that Petitioner's contractual rights have been substantially impaired by the state.

This is a case in which the Los Angeles County Superior Court engaged in the lawmaking function disfavored by this Court. By disregarding the contracts' limiting language, and then refusing to exonerate the bond or vacate the forfeiture as Petitioner was entitled under statute, the court rewrote the California Penal Code statute governing forfeiture, effectively abrogating it.

In light of this, Petitioner respectfully suggests it is time for this Court to revisit its Impairment Clause limitations, and hold that the clause protects against judicial lawmaking that impairs contracts. In light of the Founders' great concern to protect the obligation of contracts, a state should no longer be permitted to accomplish by judicial fiat what it cannot do by legislation.

2. The State's Action is a Taking of Petitioner's Contract Rights In Violation of the Fifth Amendment's Taking Clause

The Takings Clause of the Fifth Amendment protects against taking a property without just compensation. *Lynch v. U.S.* (1934) 292 U.S. 571, 579, 54 S.Ct.840, 843. Rights acquired under a valid contract are property rights and are protected from arbitrary takings by the state without just compensation. *Id.*; *U.S. Trust Co. of New York, supra,* 431 U.S. at 19; *see also Adams v. U.S.* (Fed. Cir. 2004) 391 F.3d 1212, 1221 (when the government and private parties contract, the private party acquires an intangible property interest in the contract protected against government taking). The Fifth Amendment's prohibition against arbitrary takings is applicable to the states through the Fourteenth Amendment. *Dolan v. City of Tigard* (1994) 512 U.S. 374, 384, 114 S.Ct. 2309, 2316; *Nollan v. California Coastal Comm'n*, (1987) 483 U.S. 825, 827, 107 S.Ct. 3141, 3143.

In the context of contractual rights the standard followed in determining whether such rights have been unconstitutionally "taken" by state action is unclear. Up through this year, the Court has applied a due process test -- an unlawful taking has occurred when a government regulation fails to "substantially advance" a legitimate state interest. *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260, 100 S.Ct. 2138, 2141. However, earlier this year, this Court held that the due process test should not apply to real

property eminent domain takings. *Lingle v. Chevron U.S.A., Inc.* (2005) __ U.S. ___, 125 S.Ct.2074, 2083. *Lingle* declined to recognize a set formula in such cases, but focused its consideration upon the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with the claimant's investment-backed expectations. *Id.* at 2081-2082; *see also Penn Central Transportation Corp. v. New York City* (1978) 438 U.S. 104, 98 S.Ct.2646.

As such, it is necessary to determine what standard should apply when the taking is not of real property, but rather of a vested contract right. However, whether the *Lingle* or *Agins* test is applied, Petitioner has suffered a taking of its property rights. By its arbitrary forfeiture of Petitioner's bonds, and its subsequent refusal to exonerate the bonds and vacate the forfeiture as mandated by the Penal Code statute, the Los Angeles County Superior Court has engaged in a taking. It unilaterally disregarded Petitioner's limiting language, and now expects Petitioner to honor a contractual commitment it never made.

It must be noted that this is not an instance where a court has simply made an erroneous ruling, preferring one litigant over another. This is a case in which a state actor has disregarded a contractual limitation for its own pecuniary benefit, and from which now seeks to garner a windfall of more than $1.5 million.

Because it has done so without just compensation, the Superior Court's forfeiture declaration has deprived Petitioner of the benefits of the limiting language in its contract, deprived it economically by seeking to enforce a commitment of more than $1.5 million which the Petitioner never made, and done so without advancing any legitimate government interest. Because the taking in this case violates

both the *Agins* and *Lingle* tests, this Court should grant review to determine which test applies when non-real property takings are at issue.

3. The State's Action Impairs Petitioner's Property Rights, in Violation of the Fourteenth Amendment's Due Process Clause

The Fourteenth Amendment's Due Process Clause is intended to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 846, 118 S.Ct. 1708, 1716. It is well settled that a state action which arbitrarily deprives an individual of a property right violates the Fourteenth Amendment's Due Process Clause. *Fuentes v. Shevin* (1972) 407 U.S. 67, 82, 92 S.Ct. 1983, 1955; *Shelton v. City of College Station* (10th Cir. 1985) 754 F.2d 1256-1257.

The Petitioner has a Fourteenth Amendment right of Due Process against arbitrary state action which results in an arbitrary taking of its property rights. A state regulation violates due process when it is arbitrary or irrational. *Lingle, supra*, 125 S.Ct. at 1083, citing *County of Sacramento, supra*. Even though *Lingle* rejected the due process consideration in real property takings cases, the decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." *Id.* at 2087 (*Kennedy*, concurring). In the context of contractual rights, due process is violated when the contract is impaired by a law that renders the contract invalid, releases or extinguishes it, or without destroying the contract, derogates from its substantive contractual rights. *Thorpe v. Housing Authority of City of Durham* (1969) 393 U.S. 268, 279, 89 S.Ct.518, 524.

The Los Angeles County Superior Court denied Petitioner due process when it arbitrarily declared a forfeiture of Petitioner's bonds, in violation of its express limitations. The court arbitrarily denied Petitioner the benefits of important substantive rights – the limiting language of the bonds and the powers of attorney – leaving intact the Petitioner's obligation to pay. Thus, while not extinguishing the contract, the court's action materially derogated Petitioner's substantive contractual rights.

That the court's action is irrational is also beyond any doubt. The action served no legitimate government purpose. Forfeiture of the bonds did not secure the appearance of the defendant, or advance the state's legitimate contract rights. Rather, the state seeks to reap a windfall by disregarding limiting language of a contract, declaring such language null and void, and enforcing the obligation to pay.

4. This Court Should Grant Review of this Case to Determine Issues of Great Public Importance

Petitioner advises the Court in all candor that the constitutional issues raised in this Petition have not been raised in the courts below. However, the Superior Court's constitutional violations are clear, and the issues raised in this case are of paramount public importance – whether a state can willingly disregard its surety contracts in violation of due process and the prohibition against impairment of contracts. Because the facts in this case are undisputed and the constitutional issues clear, exceptional circumstances exist which allow this Court to grant certiorari even though such issues have not been raised below. *United States v. Mendenall* (1980) 446 U.S. 544, 551, 100 S.Ct. 1870, 1875, fn. 5; *Cooper Indus., Inc. v. Aviall Services, Inc.* (2004) __ U.S.__, 125 S.Ct. 577, 585.

Moreover, this Court has regularly granted review to address matters of great public policy. For example, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 585, 113 S.Ct. 2786, public policy considerations prompted this Court to accept review to settle sharp differences among the lower courts regarding the admissibility of expert scientific testimony before general acceptance of the methodology used or conclusions reached. *See* Nelson et al., *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice*, The Rutter Group, 2005 ed., §12:206.

This case presents just such a vital issue of public policy. As in *Daubert*, this case will allow the Court to clarify an important, unsettled legal principle – how to determine whether a government "taking" of property rights violates the Fifth Amendment's Takings Clause. Apart from this technical issue, this case presents this Court with the opportunity to further define a state's due process obligations with respect to its own contracts, and to further combat acts of judicial lawmaking against which this Court has repeatedly warned.

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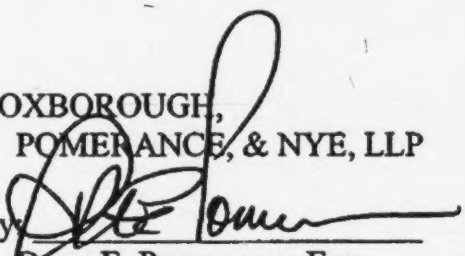
CONCLUSION

Protection of important constitutional and contractual rights requires this Court to review the California Supreme Court's denial of review of the state's Second District Court of Appeals decision against Petitioner. For the reasons set forth above, this writ of certiorari should be granted.

Respectfully submitted.

Dated: July 27, 2005

ROXBOROUGH, POMERANCE, & NYE, LLP

By: 

Drew E. Pomerance, Esq.
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Appendix A

California Penal Code §1305

(Bail Bond Forfeiture Statute)

"(a) A court shall in open court declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear for any of the following:

"(1) Arraignment.

"(2) Trial.

"(3) Judgment.

"(4) Any other occasion prior to the pronouncement of judgment if the defendant's presence in court is lawfully required.

"(5) To surrender himself or herself in execution of the judgment after appeal.

"However, the court shall not have jurisdiction to declare a forfeiture and the bail shall be released of all obligations under the bond if the case is dismissed or if no complaint is filed within 15 days from the date of arraignment.

"(b) If the amount of the bond or money or property deposited exceeds four hundred dollars ($400), the clerk of the court shall, within 30 days of the forfeiture, mail notice of the forfeiture to the surety or the depositor of money posted instead of bail. At the same time, the court shall mail a copy of the forfeiture notice to the bail agent whose name appears on the bond. The clerk shall also execute a certificate of mailing of the forfeiture notice and shall place the certificate in the court's file. If the notice of forfeiture is required to be mailed pursuant to this section, the 180-day period provided for in this section shall be extended by a period of five days to allow for the mailing. If the surety is an authorized corporate surety, and if the bond plainly displays the mailing address of the corporate surety and the bail agent, then notice of the forfeiture shall be mailed to the

surety at that address and to the bail agent, and mailing alone to the surety or the bail agent shall not constitute compliance with this section. The surety or depositor shall be released of all obligations under the bond if any of the following conditions apply:

"(1) The clerk fails to mail the notice of forfeiture in accordance with this section within 30 days after the entry of the forfeiture.

"(2) The clerk fails to mail the notice of forfeiture to the surety at the address printed on the bond.

"(3) The clerk fails to mail a copy of the notice of forfeiture to the bail agent at the address shown on the bond.

"(c)(1) If the defendant appears either voluntarily or in custody after surrender or arrest in court within 180 days of the date of forfeiture or within 180 days of the date of mailing of the notice if the notice is required under subdivision (b), the court shall, on its own motion at the time the defendant first appears in court on the case in which the forfeiture was entered, direct the order of forfeiture to be vacated and the bond exonerated. If the court fails to so act on its own motion, then the surety's or depositor's obligations under the bond shall be immediately vacated and the bond exonerated. An order vacating the forfeiture and exonerating the bond may be made on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.

"(2) If, within the county where the case is located, the defendant is surrendered to custody by the bail or is arrested in the underlying case within the 180-day period, and is subsequently released from custody prior to an appearance in court, the court shall, on its own motion, direct the order of forfeiture to be vacated and the bond exonerated. If the court fails to so act on its own motion, then the surety's or depositor's obligations under the bond shall be immediately vacated and the bond exonerated. An order vacating the forfeiture and exonerating the bond may be

made on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.

"(3) If, outside the county where the case is located, the defendant is surrendered to custody by the bail or is arrested in the underlying case within the 180-day period, the court shall vacate the forfeiture and exonerate the bail.

"(4) In lieu of exonerating the bond, the court may order the bail reinstated and the defendant released on the same bond if both of the following conditions are met:

"(A) The bail is given prior notice of the reinstatement.

"(B) The bail has not surrendered the defendant.

"(d) In the case of a permanent disability, the court shall direct the order of forfeiture to be vacated and the bail or money or property deposited as bail exonerated if, within 180 days of the date of forfeiture or within 180 days of the date of mailing of the notice if notice is required under subdivision (b), it is made apparent to the satisfaction of the court that both of the following conditions are met:

"(1) The defendant is deceased or otherwise permanently unable to appear in the court due to illness, insanity, or detention by military or civil authorities.

"(2) The absence of the defendant is without the connivance of the bail.

"(e) In the case of a temporary disability, the court shall order the tolling of the 180-day period provided in this section during the period of temporary disability, provided that it appears to the satisfaction of the court that the following conditions are met:

"(1) The defendant is temporarily disabled by reason of illness, insanity, or detention by military or civil authorities.

"(2) Based upon the temporary disability, the defendant is unable to appear in court during the remainder of the 180-day period.

"(3) The absence of the defendant is without the connivance of the bail. The period of the tolling shall be extended for a reasonable period of time, at the discretion of the court, after the cessation of the disability to allow for the return of the defendant to the jurisdiction of the court.

"(f) In all cases where a defendant is in custody beyond the jurisdiction of the court that ordered the bail forfeited, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.

"(g) In all cases of forfeiture where a defendant is not in custody and is beyond the jurisdiction of the state, is temporarily detained, by the bail agent, in the presence of a local law enforcement officer of the jurisdiction in which the defendant is located, and is positively identified by that law enforcement officer as the wanted defendant in an affidavit signed under penalty of perjury, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court shall vacate the forfeiture and exonerate the bond on terms that are just and do not exceed the terms imposed in similar situations with respect to other forms of pretrial release.

"(h) As used in this section, 'arrest' includes a hold placed on the defendant in the underlying case while he or she is in custody on other charges.

"(i) A motion filed in a timely manner within the 180-day period may be heard within 30 days of the expiration of the 180-day period. The court may extend the 30-day period upon a showing of good cause. The motion may be made by the surety insurer, the bail agent, the surety, or the depositor of money or property, any of whom may appear in person or through an attorney. The court, in its discretion, may require that the moving party provide 10

days prior notice to the applicable prosecuting agency, as a condition precedent to granting the motion."

Appendix B
Relevant Orders and Judgments

COURT OF APPEAL, SECOND APPELLATE DISTRICT,
DIVISION SEVEN- No. B169321
S130584

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Respondent,

vs.

AEGIS SECURITY INSURANCE COMPANY, Appellant

Petition for review DENIED.

Brown, J, was absent and did not participate

GEORGE
/s
Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PEOPLE OF THE STATE OF CALIFORNIA; Respondent, vs. AEGIS SECURITY INSURANCE COMPANY, Defendants.	B169321 (Los Angeles County Super. Ct. No. GA04792)

APPEAL from an order of the Superior Court of Los Angeles County. Lillian M. Stevens, Judge. Affirmed.

Nunez & Bernstein and E. Alan Nunez, for Appellant.

Steve Cooley, District Attorney, Patrick Moran and William Woods, Deputy District Attorneys, for Respondent.

A surety appeals from an order denying its motion to vacate a forfeiture of bail and to exonerate its bonds. The bail agent issued two of the surety's bail bonds totaling $1,560,000 to secure the appearance of a defendant at his sentencing hearing. The defendant failed to appear and the court declared bail forfeited. The surety argues it was entitled to exoneration because the bonds were improperly combined in violation of their express prohibition against "stacking." The surety also claims the bonds are void on their face because of the powers of attorney attached to the bonds contained a blank space where the attorney in fact's name should have been inserted. The trial court denied the surety's motion to exonerate the bonds. We affirm.

FACTS AND PROCEEDINGS BELOW

A jury convicted Carlos Hernandez of attempted murder and found true various enhancement allegations. The court set December 11, 2002, as his sentencing date and continued his bail at $1,560,000.

On December 1, 2002, Apo's Bail Bonds executed two Aegis Security Insurance Company (Aegis) bail bonds for Hernandez's release pending sentencing: one for $560,000 and a second one for $1,000,000. Hernandez was released the next day. The bonds were filed with the court on December 10, 2002, the day the Hernandez's sentencing hearing.

The bonds contain a warning which states:

"THE BOND IS VOID IF WRITTEN FOR AN AMOUNT GREATER THAN THE POWER OF ATTORNEY ATTACHED HERETO, IF MORE THAN ONE SUCH POWER IS ATTACHED OR IF WRITTEN

AFTER THE EXPIRATION DATE SPECIFIED ON THE ATTACHED POWER OF ATTORNEY."

A power of attorney for $1 million was attached to the bond for $1 million and a power of attorney for $560,000 was attached to the bond for $560,000.

The power of attorney forms contain their own cautionary language. One warning specifies: "This Power of Attorney is Void if Altered or Erased, the Obligation of the Company Shall not Exceed the Sum of one million Dollars ($1,000,000)...."

Prominently displayed on the power of attorney form is another warning. This one specifies:

"NOTICE' STACKING OF POWER IS STRICTLY PROHIBITED! No more than one power from the Surety may be used to execute any one bond."

Hernandez failed to appear for sentencing and the court declared bail forfeited. The clerk of the court mailed

notice of the forfeiture to the bail agent and surety on December 11, 2002.

Aegis later moved to exonerate the bonds. It claimed the bonds were void because the agent combined two bonds in order to satisfy the bail amount which was a violation of the powers of attorney's express prohibition against "stacking." Moreover, Aegis argued, two bonds were improperly combined to post bail in excess of $1 million despite the language on the powers of attorney stating a power is void if written for more than $1 million.

The trial court found combining two powers of attorney for the aggregate amount of $1,560,000 did not constitute improper "stacking" in this case. The court noted there were two separate bonds with two separate powers of attorney, and neither power of attorney was for an amount in excess of $1 million. The court noted one power of attorney was for $1 million and the other power of attorney was for $560,000. Accordingly, the trial court found the bonds

complied with the express language on the power of attorney form specifying "No more than one power from this Surety" could validly "execute any one bond."[1]

The court rejected Aegis' argument the bonds were void because the power of attorney improperly combined to exceed the $1 million limit. The court referred to the anti-"stacking" language on the power of attorney and noted Aegis "could have said in any *one case*, any *one defendant*, but they didn't say that. They said, 'Any *one bond.*"[2] Accordingly, the trial court denied Aegis's request to vacate the forfeiture and exonerate the bonds. The appeal followed.

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[1] Italics added.

[2] Italics added.

DISCUSSION

I. THE BAIL BONDS WERE NOT RENDERED VOID FOR UNCERTAINTY BECAUSE THE NAME OF THE ATTORNEY IN FACT WAS NOT ALSO PRINTED IN THE SPACE PROVIDED ON THE POWER OF ATTORNEY FORM.

Aegis argues the bonds are void because the powers of attorney are defective on their face. Aegis notes the forms are blank on the line where the name of the attorney in fact should have been written in.[3] Aegis argues, had the jailer or

[3] In its request for judicial notice accompanying its motion to exonerate bail, Aegis noted the powers of attorney were incomplete because the space provided on the form to insert the name of the attorney in fact was left blank. Aegis did not press this issues in oral argument before the trial court. Thus, the only issue developed and decided at the hearing was the issue whether posting the two bonds constituted improper "stacking."

The People argue Aegis has waived this issue on appeal by failing to brief and argue the issue at the hearing. (Citing, *Lilly v. Lilly* (1982) 129 Cal.App.3d 925, 928 [the failure to raise an issue and a seek a ruling from the trial court bars the issue from being advanced for the first time on appeal]; *266-286 Geary Street, L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1200 [appellate court will not review factual issue raised for the first time on appeal].) Aegis, for its part, claims where a contract is void its invalidity may be

court clerk detected the defect and looked into the matter, the clerk or the jailer would have discovered the bonds were void for exceeding their $1 million limit.

In support of its argument, Aegis relies on the decision in *People v. Surety Insurance Company.*[4] In May 1975, Surety Insurance Company notified the County Clerk's office it had authorized Ray W. Jones to execute bail bonds and appeal bonds on its behalf. In July 1977, Surety filed another notice with the County Clerk's office stating it had revoked Ray W. Jones's power of attorney. Nevertheless, in April 1979 Ray W. Jones executed a $30,000 bail bond for a defendant's release which identified

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raised for the first time on appeal. (Citing, *Baird v. Smith* (1932) 216 Cal.408; *County of Madera v. Ranger Ins. Co.* (1991) 230 Cal.App.3d 271, 279; *Jellen v. O'Brien* (1928) 89 Cal.App.505.)

As noted, Aegis mentioned the issue in its moving papers before the trial court- albeit in its request for judicial notice in conjunction with its motion to exonerate the bonds. In any event, because the issue does not present material issues of unresolved fact we are in as good a position as the trial court to resolve the issue in the first instance.

[4] *People v. Surety Ins. Co* (1982) 136 Cal.App.3d 556.

Surety as the bail surety and himself as the attorney in fact for Surety. The official seal affixed to the document stated the notary's commission expired in February 1997, or more than two years earlier. The defendant failed to appear and the court declared bail forfeited.[5]

Surety argued it could not be held liable on any bonds written by Ray W. Jones after it notified the County Clerk it had revoked his authority to act as its attorney in fact. Surety also argued the County Clerk's office had been negligent in failing to notice the bonds stated in two different places the notary's commission had expired two years earlier. [6] The appellate court agreed. "Here the Los Angeles County Clerk's office patently negligent in failing to check its own records when it accepted the appeal bond for filing in 1979. If it had done so, it would have found the 1977 revocation of Jones' authority. What was even more obvious

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[5] *People v. Surety Ins. Co, Supra*, 136 Cal.App.3d 556, 560-561.

[6] *People v. Surety Ins. Co, Supra*, 136 Cal.App.3d 556, 561.

was the defective acknowledgment on the appeal bond filed in 1979. Like beacon lights reflecting on in the darkness, there were two affirmations of the fact that the notary's commission expired on February 4, 1977. Any reasonable prudent deputy county clerk reading the face of the document tendered for filing should have been alerted to the fact that 'something was rotten in the state of Denmark.'"[7]

The decision in *Surety* is distinguishable. Unlike the situation in *Surety*, Aegis makes no claim it had revoked APO's Bail Bonds or its employees' authority to act as its attorney in fact. Also, and unlike the situation in *Surety*, the blank on the form did not on its face show patent invalidity. Although Apo's Bail Bonds' employee did not print his name in the space provided for printing the name of the attorney in fact, he did place his signature on the line designated for the attorney in fact's signature.

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[7] *People v. Surety Ins. Co, Supra*, 136 Cal.App.3d 556, 562.

Aegis points to no statute which states it is a mandatory requirement for executing a power of attorney for the attorney in fact to both sign and print his or her name on the power of attorney form.[8] Thus, in the absence of any statutory directive, we presume general principles of law apply in determining the legal effect of an incomplete power of attorney. Under general law, "To be valid, a power of attorney must be sufficiently certain in its terms so that when the rules for the interpretation of written instruments are applied, the court is able to say what the parties intended."[9] This general rule applies to bail bonds as well. "Blanks or

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[8] Compare, Probate Code section 4000 et seq. governing durable powers of attorney; Probate Code section 4400 et seq. governing statutory form powers of attorney; and Probate Code section 4600 et seq. governing powers of attorney for health care, with Probate Code section 4050, subdivision (b) excluding other types of powers of attorney from these statutory provisions.

[9] 2A, Corpus Juris Secundum, Agency, section 38, page 329.

omissions in a bail bond may not invalidate the instrument, if they do not render the instrument uncertain or misleading."[10]

We conclude the omission in the case at bar did not render the powers of attorney too uncertain or misleading to be valid. The documents were clearly executed by Aegis's agent Apo's Bail Bonds. Aegis does not argue otherwise. Apo's Bail Bonds stamp appears prominently on the reverse of the form. Abraham N., of Apo's Bail Bonds, signed the power of attorney forms on the line provided for the signature of the attorney in fact. Had he also printed his name in the blank it would not have made the attorney in fact form more clearly issued and executed by an authorized

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[10] 8 Corpus Juris Secundum, Bail, section 94, page 117; see also, *Elrage v. Greenlee County* (1914) 16 Ariz. 159, 161; 141 P. 575 ["By a clerical misprision the name of the defendant Blake was left blank in preliminary recital of the undertaking. But these appellants in the written undertaking do recite that the above-named William Blake will appear and answer, etc. In this respect there is no uncertainty, and, if Blake's name had been inserted in the blank, it would not have made the conditions of the undertaking more definite."].

representative of Aegis's acknowledged agent.[11] Accordingly, we find the omission in the case at bar provided no basis for finding the powers of attorney void on their face.

II. THERE WAS NO PROHIBITED "STACKING" IN THIS CASE BECAUSE EACH BOND HAD A SEPARATE POWER OF ATTORNEY ATTACHED, NEITHER OF WHICH EXCEEDED $1 MILLION.

Aegis argues the bail bonds were void because the two bonds in combination violated the restriction against "stacking." Aegis cites two decisions which it claims demonstrate it is entitled to relief.

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[11] Compare, *County of Los Angeles v. Surety Ins. Co.* (1985)(165 Cal.App.3d 704 [bail bonds issued by a corporate insurer admitted in California to issue bail bonds were not invalid simply because the bail bond form was blank in the space provided for the trial court to sign and date the form to indicate its approval and acceptance of the bonds].

In *People v. Ranger Insurance Company*,[12] the same bail agent posted two bonds totaling $150,000. National Automobile and Casualty Insurance Company issued a bond for $50,000. A limitation on the face of the bond stated the bond was void "'if limits altered or erased or if used singly or with *other bonds of this company* to furnish bail in excess of $50,000.'" Ranger Insurance Company posted the second bond for $100,000. The power of attorney attached to the bond stated in pertinent part, "This power [is] void... if used... in *combination with powers from any other surety company*, void if used to furnish bail in excess of the stated face amount of this power [of $100,000]..."[13] The trial court declared the bonds forfeited when the defendant failed to appear. The sureties moved to vacate the forfeitures. The trial court denied National's motion and granted Ranger's motion.

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[12] *People v. Ranger Ins. Co* (1994) 31 Cal.App.4th 13

[13] *People v. Ranger Ins. Co., supra*, 31 Cal.App.4th 13, 16, italics added.

On appeal National argued the limiting language in its bond meant the bond was void if combined, or "stacked," with a bond of another company. The appellate court disagreed. It affirmed the order denying National's motion because the language in its bond only prohibited its combination with other National bonds and did not prohibit combining one of its bonds with bonds of another surety. "If National wished to bar use of its policy with that of another company, it could have used language such as that found in Ranger's policy. National chose not to do so. We will not rewrite its policy for it. Because the issuance of National's policy did not violate any explicit bond provisions, the trial court properly denied National's motion to set aside the forfeiture."[14]

In *People v. Ranger Insurance Company*,[15] the surety argued it was entitled to have its $65,000 bond

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[14] *People v. Ranger Ins. Co., supra,* 31 Cal.App.4th 13, 20-21.

[15] *People v. Ranger Ins. Co.,* (1998) 61 Cal.App.4th 812.

exonerated because it was improperly combined, or "stacked," with a $10,000 Amwest bond to meet the defendant's post-conviction bail. The appellate court disagreed. The limitation appearing on the face of the Ranger power of attorney form stated, '"This power [is] void if altered or erased, *void if used with other powers of this company or in combination with powers from any other surety company*, void if used to furnish bail in excess of the stated face amount of this power, and can only be used once,...'"[16] The court acknowledged use of at least two powers of attorney might "indirectly fall under the express restriction on combining powers. But the language which Ranger relies upon refers only to the combination of 'powers' and does not clearly and specifically prohibit using two separate bonds to meet bail."[17] Accordingly, the court

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[16] *People v. Ranger Ins. Co., supra,* 61 Cal.App.4th 812, 816.

[17] *People v. Ranger Ins. Co., supra,* 61 Cal.App.4th 812, 816.

found no basis to exonerate the forfeiture because Ranger's power of attorney was used instead in combination with an Amwest bond.[18]

These decisions do not assist Aegis. If anything, these decisions emphasize the limiting language a surety chooses to use in its contractual documents strictly controls whether an anti-"stacking" provision is violated.

In the present case the bond contains limiting language providing: 'THIS BOND IS VOID IF WRITTEN FOR AN AMOUNT GREATER THAN THE POWER OF ATTORNEY ATTACHED HERETO, IF MORE THAN ONE SUCH POWER IS ATTACHED OR IF WRITTEN AFTER THE EXPIRATION DATE SPECIFIED ON THE ATTACHED POWER OF ATTORNEY." The anti-"stacking" language appearing in the powers of attorney provides: "No more than one power from the Surety may be used to execute any one bond." Another warning states,

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[18] *People v. Ranger Ins. Co., supra,* 61 Cal.App.4th 812, 817.

"This Power of Attorney is Void if Altered or Erased, the Obligation of the Company Shall not Exceed the Sum of one million Dollars ($1,000,000)...."

The two bonds in the present case did not violate these limitations. Only one power of attorney was attached to each bond. Moreover, neither power of attorney nor bond exceeded the stated maximum of $1 million.

Had all the limiting language on its bonds and powers been carefully scrutinized, Aegis argues the clerk or jailer would have realized it also prohibited the posting of Aegis bonds for more than $1 million *per defendant or case*.[19] However, this limiting language appears nowhere in

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[19] At some unspecified point, Aegis offered a declaration from the company's president in support of its motion to exonerate the bonds. In her declaration Darleen Fritz stated: Aegis contracted with Capital Bonding Corporation to be its national program administrator in California; it gave Capital Bonding power of attorney to write bail bonds on its behalf limited to $1 million or less; any bail posted in excess of $1 million required her personal approval; and she had never authorized Capital or any of its agents to post a bail bond in excess of $1 million. Ms. Fritz further declared she was not informed of, and had not approved, posting bail for

either the Aegis bond or its power of attorney form. Because the language Aegis chose to use does not "clearly and specifically"[20] prohibit combining bonds in a single case, or for a single defendant, we find no violation of its anti-"stacking" provision and thus no basis to exonerate the forfeitures in this case.

$1,560,000 in this case and had never represented to any governmental official in California any of its agents were authorized to post bail for amounts in excess of $1 million.

As noted, a surety's liability on a bond is controlled by the language the surety actually chose to use in its documents rather than by what, in retrospect, it wished its had said instead.

[20] *People v. Ranger Ins. Co., supra,* 61 Cal.App.4th 812, 816.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JOHNSON, Acting P.J.

We concur:

WOODS, J.

ZELON, J.